

**STATE OF WISCONSIN  
Department of Commerce**

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In the Matter of the PECFA Appeal of-

Rick Pinnon  
Country Store East, Inc.  
818 Blackhawk Blvd.  
South Beloit, Illinois 61080

PECFA Claim: # 53511-9999-51  
Hearing: #98-170

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**Final Decision**

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**Preliminary Recitals**

Pursuant to a Petition for Hearing filed October 22, 1998, under § 101.02 (6) (e) Wis. Stats., and § Comm/ILHR 47.53 Wis. Adm. Code, to review a decision by the Wisconsin Department of Commerce (Department), a hearing was commenced on February 17, 2000, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on March 20, 2000, and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department correctly denied reimbursement under the PECFA program of costs totaling \$45,826.67.

There appeared in this matter the following persons:

**PARTIES IN INTEREST:**

Rick Pinnon  
Country Store East, Inc.  
818 Blackhawk Blvd.  
South Beloit, Illinois 61080

Wisconsin Department of Commerce  
PECFA Bureau  
201 W. Washington Avenue  
P.O. Box 7838  
Madison, Wisconsin 53707-7838

By: Kelly Cochrane, Esq.  
Assistant Legal Counsel

Wisconsin Department of Commerce  
201 W. Washington Avenue, Room 322A  
P.O. Box 7838  
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02(3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

### **FINDINGS OF FACT**

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

### **CONCLUSIONS OF LAW**

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

### **DISCUSSION**

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for Purposes of Final Decision.

### **FINAL DECISION**

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

### **NOTICE TO PARTIES**

#### **Request for Rehearing**

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important or you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated: 4/20/00

Martha Kerner  
Executive Assistant  
Wisconsin Department of Commerce  
201 West Washington Avenue  
P.O. Box 7970  
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager  
Unemployment Insurance Hearing Office  
1801 Aberg Avenue, Suite A  
Madison, Wisconsin 53707-7975

Date Mailed: April 20, 2000  
Mailed By: Susan Budka

**STATE OF WISCONSIN  
DEPARTMENT OF COMMERCE**

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*In the Matter of the PECFA Appeal of*

Rick Pinnon  
Country Store East Inc  
818 Blackhawk Blvd  
South Beloit IL 61080

PECFA Claim # 53511-9999-51  
Hearing #98-170

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**DELEGATION ORDER -- PECFA APPEAL**

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I, Brenda J. Blanchard, Secretary of the Department of Commerce, pursuant to §227.46(3)(a), Stats., do hereby delegate to the administrative law judge assigned to the above captioned appeal the authority to issue a final decision if a contested case hearing is not held because of withdrawal, default, settlement, untimeliness of the appeal, mootness of the appeal, lack of subject matter jurisdiction, or lack of standing to appeal. Pursuant to §227.46(3)(c), Stats., if a decision addressing the merits of the appeal is required or it is decided on any basis not delegated to the administrative law judge as described above, it shall be issued by the administrative law judge pursuant to the procedures in §227.46(2) as a proposed decision, and the Executive Assistant of the Department, Martha Kerner, shall make the final decision for the department.

Dated: September 4, 1999

Brenda J Blanchard  
Secretary  
Department of Commerce

Copies to:

Rick Pinnon  
Country Store East Inc  
818 Blackhawk Blvd  
South Beloit IL 61080

Kelly Cochran, Assistant Legal Counsel  
Office of the Secretary  
Department of Commerce  
P O Box 7838  
Madison WI 53707-7838

**STATE OF WISCONSIN  
DEPARTMENT OF COMMERCE**

**IN THE MATTER OF: The claim for  
reimbursement under the PECFA  
Program by**

MADISON HEARING OFFICE  
1801 Aberg Ave., Suite A  
P.O. Box 7975  
Madison, WI 53707-7975  
Telephone: (608) 242-4818  
Fax: (606) 242-4813

Rick Pinnon  
Country Store East, Inc.  
818 Blackhawk Blvd  
South Beloit, IL 61080

**Hearing Number: 98-170  
Re: PECFA Claim # 53511-9999-51**

**PROPOSED HEARING OFFICER DECISION**

**NOTICE OF RIGHTS**

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975 Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Wm. Bruce Fox, Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:  
James H. Moe

DATED AND MAILED:  
March 20, 2000

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**MAILED TO:**

**Appellant Agent or Attorney**

**Department of Commerce**

Kelly Cochran  
Assistant Legal Counsel  
P.O. Box 7838  
Madison, WI 53707-7838

**STATE OF WISCONSIN  
DEPARTMENT OF WORKFORCE DEVELOPMENT**

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*In the Matter of the claim for Reimbursement under the PECFA Program by*

Rick Pinnon  
Country Store East, Inc.  
818 Blackhawk Blvd  
South Beloit, IL 61080

Hearing No. 98-170  
PECFA Claim No. 53511-9999-51

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**PROPOSED DECISION**

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On September 22, 1998, the Wisconsin Department of Commerce (Department) issued a decision denying the request by Country Store East, Inc. (Appellant) for reimbursement of costs totaling \$45,826.67 under the PECFA program. The Appellant filed a timely appeal to denied costs, and a hearing was held on February 17, 2000 at Madison, Wisconsin, before James H. Moe, acting as state hearing examiner.

Based on the applicable records and evidence in this case, the state hearing examiner makes the following

**PROPOSED FINDINGS OF FACT**

1. At all times material, Rick Pinnon, doing business as Country Store East, Inc., was the legal owner of the premises located at 1351 Grand Avenue, Beloit, Wisconsin.
2. The appellant filed a claim for reimbursement of expenses associated with site cleanup at the site in the amount of \$143,862.97. Of that amount, the Department found that \$45,826.67 was not eligible for reimbursement under the PECFA program.
3. The appellant appealed denial of the following amounts:
  - a) Certain mileage charges (\$787.50) invoiced by Superior Environmental Services.
  - b) Analytical charges (\$516) invoiced by CBC Environmental Laboratories, Inc.
  - c) Frost and concrete breaking charges (\$870) invoiced by Stiles Environmental, Inc.
  - d) Certain commodity services charges (\$26,278.89) invoiced by Rock Road Companies, Inc.
4. Itemized invoices from Superior Environmental Corp., claimed vehicle charges of \$75 per day. The Department denied reimbursement of those costs because no evidence of the actual mileage involved had been submitted. As explained by the Appellant's appeal letter, five of the invoices billed for nine roundtrips from Waukesha to Beloit for a total of 1350 miles. The remaining three invoices billed for three one-way trips from Waukesha to Beloit for a total of 225 miles. The total actual mileage was 1575. Trucks were the vehicles used for all of those miles. The applicable state reimbursement rate for trucks is \$0.45.

5. The Rock Road Companies, Inc., invoice related to commodity services involving hauling and treating 816.26 tons of petroleum contaminated soil. The Appellant was unable to obtain three bids for those services. Neither the Appellant nor its consultant requested or obtained approval from the Department to deviate from the three-bid requirement.
6. Costs totaling \$516 invoiced by CBC Environmental Laboratories, Inc., for Diesel Range Organic (DRO) analysis were not included in the original laboratory bid documents.
7. Costs totaling \$870 invoiced by Stiles Environmental, Inc., for breaking frost and concrete were not included in the original bid documents. The original bid contained no contingency provision.

### **RELEVANT LAW**

In relevant part, Wis. Admin. Code § ILHR 47.30, provides:

- (1) **ELIGIBLE COSTS.** . . Costs related to the following categories may be reimbursed under the scope of this chapter:

- (e) Costs associated with personnel, travel and related expenses:

3. Actual costs incurred for travel and lodging which are not in excess of state travel rates;

Wis. Admin. Code § ILHR 47.33(1), provides in relevant part, as follows:

- (b) *Commodity purchases.* 1. All commodity services which include, but are not limited to, soil borings, monitoring-well construction, laboratory analysis, excavation and trucking shall be obtained through a competitive bid process. A minimum of 3 bids are required to be obtained and the lowest cost service provider shall be selected.

4. An owner or operator may appeal to the department to obtain approval to select other than the lowest cost commodity service provider. The department may approve an appeal if it determines that the use of another service provider will further the goals of the program.

### **PROPOSED DISCUSSION**

The Department initially denied the mileage costs invoiced on the Superior Environmental because the invoices failed to list the actual mileage involved as well as the type of vehicle involved. However, the Appellant's appeal letter established the actual mileage associated with each invoice. Moreover, testimony from the consultant's environmental manager established that all of those miles related to trucks. While the Appellant should have provided this information to the department initially, it has presented all relevant factual information at the hearing to establish that those mileage costs are properly reimbursable. Accordingly, \$708.75 (1525 miles at \$0.45 per mile) of the \$787.50 in mileage costs submitted are reimbursable.

Wisconsin Admin. Code § ILHR 44.33(1)(b) requires that commodity services must be obtained through a competitive bid process, with a minimum of three bids, and selection of the lowest cost provider. The Appellant, through its consultant, did not obtain three competitive bids for the soil hauling and treatment services performed by Rock Road Co., Inc. Although the statutes permit the Appellant to request a waiver from the Department when three competitive bids are not obtained, the Appellant concedes that no such permission was received or obtained from the Department for those services. Because the bid process required by the regulations was not met, the Department correctly denied reimbursement of those invoiced costs.

The Appellant argues that the DRO costs should be reimbursed because of a change in the site conditions. However, there was no competitive bidding on the DRO analysis in question. The above regulations require all commodity services, which include laboratory analysis, to be competitively bid. To interpret the regulation as allowing for some services to be performed without competitive bidding merely because some other services had already been bid by the provider in question defeats the purpose of the regulation and allows reimbursement of some commodity services without competitive bidding. Therefore, if additional commodity services are required which were not originally bid, the regulation requires additional bidding. Because the DRO analysis was not competitively bid, the Department correctly denied reimbursement of those costs.

The Appellant further argues that costs associated with breaking frost and concrete were unexpected items and not contemplated in the original bid. Again, there was no competitive bidding of those services as required by the regulations. While the Appellant asserts that a bid cannot take into account every site-specific situation, that could have been easily remedied by including a contingency provision in the bids. While the frost and concrete breaking services might very well have been necessary, the Appellant has failed to demonstrate why breaking frost would be unexpected in February when the services were performed. Similarly, there has been no showing of why the breaking of the concrete was an unexpected item. Because these services were not competitively bid, the Department correctly denied reimbursement of the costs.

The Appellant asserts that all of the costs it incurred were necessary to prepare the property for acquisition by the Wisconsin Department of Transportation. While other units of state government might have required the work to be performed pursuant to a specified schedule, the issue here is not whether the costs incurred were necessary but whether the costs incurred are eligible for reimbursement under the PECFA program. For the reasons stated above, with the exception of the transportation costs, the Appellant has failed to demonstrate that the remaining costs have complied with the PECFA eligibility requirements.

### **PROPOSED CONCLUSIONS OF LAW**

The Appellant was an owner or agent of a property covered by the remedial provisions of Wis. Stat. § 101.143.

The Department was correct in denying reimbursement of costs totaling \$26,278.89 for services of Rock Road Companies, Inc., on the basis that those services were not competitively bid within the meaning of Wis. Admin. Code § ILHR 44.33(1)(b).

The Department was correct in denying reimbursement of costs totaling \$516 for services of CBC Environmental Laboratories, Inc., on the basis that those services were not bid within the meaning of Wis. Admin. Code § ILHR 44.33(1)(b).



The Department was correct in denying reimbursement of costs totaling \$870 for services of Stiles Environmental, Inc., on the basis that those services were not bid within the meaning of Wis. Admin. Code § ILHR 44.33(1)(b).

The Department was incorrect in denying reimbursement of vehicle costs totaling \$708.75 for the services of Superior Environmental Corp., but correct in denying vehicle costs totaling \$78.75 within the meaning of Wis. Admin. Code § ILHR 44.30(1)(e) 3.

#### **PROPOSED DECISION**

The Department shall reimburse the Appellant an additional \$708.75, the total of the approved costs in the findings and conclusions above. The Department's decision to deny all other contested amounts is affirmed.

Dated: March 20, 2000

By

James H. Moe  
Administrative Law Judge  
Acting as State Hearing Examiner for the  
Department of Commerce

98-107/jhm